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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. .....

JOHN D. PICHITINO,

Petitioner,

vs.

STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT OF PETITION

To the Honorable, The Chief Justice of the United States, and to the Honorable, The Associate Justices of the Supreme Court of the United States:

(Figures in parentheses refer to pages of the record as printed for the court below unless context clearly indicates otherwise)

The petitioner above named, John D. Pichitino, seeks under Title 28, Section 344, United States Code Annotated, being Section 237 of the Judicial Code and Rule 38 of the Rules of the Supreme Court of the United States, Writ of Certiorari to the Supreme Court of the State of Michigan, to review the judgment filed on the 8th day of June, 1953 affirming the indictment of petitioner and to review the order entered by the Supreme Court of the State of Michigan on October 5, 1953, denying petitioner's petition for a motion for re-hearing to said Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioner herein was indicted by a grand jury called by Circuit Judge Blaine W. Hatch in Calhoun County, Michigan, charging that John Pichitino and Fred Stein feloniously and unlawfully conspired and agreed together with one Ott Edrington to violate Sec. 79 of Act 341 of the Public Acts of 1937 as amended, in that said John Pichitino and the said Fred Stein did enter into an agreement together and with the said Ott Edrington for the said John Pichitino, who was then and there president of the Lakeview State Bank of Battle Creek, the same being a banking corporation governed by the Michigan Financial Institutions Act, to receive a gift, gratuity or consideration from the said Ott Edrington for the latter to procure a loan from said bank (21).

A motion to quash the said indictment was made upon grounds which may be summarized briefly as follows so far as material herein (23):

a. That the prosecuting attorney, George DeMund exercised such improper influence, direction and control over the grand jury as to vitiate all the indictments returned by the grand jury and that he likewise improperly sought to influence the testimony of witnesses appearing before the grand jury and improperly disparaged and belittled the testimony of certain other witnesses who appeared before the grand jury.

b. That William Burke, assistant prosecutor, was disqualified from appearing before the grand jury by reason of an attorney-client relation which existed between the indicted defendants and said Burke, who attended the grand jury, and that this vitiated the said indictments, said attorney-client relation having had reference to the said subject matter as that investigated by the grand jury.

c. That the said William Burke, assistant prosecutor, was retained by a private individual to make the same investigation; further that the prosecuting attorney had a direct pecuniary interest in the prosecution of the petitioner in that he was the defendant in a civil action for false arrest filed by the private secretary of one of the

indicted defendants below, Donald D. Slighly, cashier of the Lakeview State Bank of Battle Creek.

d. That the Circuit Judge directed that an improper oath of secrecy be administered not only to the grand jury but to court attaches, court reporters, and prosecuting officials and thereby prevented petitioner from proving misconduct by persons acting with the grand jury.

e. That petitioner was deprived of due process of law because the indictments were illegally received in violation of the statutes relating to grand jury procedure.

f. That the charge of the court was prejudicial in that it singled out the petitioner in such a manner as to identify him, and was of an inflammatory nature.

g. That the rights of petitioner to due process of law under the Fourteenth Amendment to the Constitution of the United States was violated.

The motion to quash was supported by various affidavits and offers of proof which set forth, briefly, that George DeMund, the prosecuting attorney, stated to one of the grand jurors his opinion that one Werner John, a witness, was coached and that he was certainly not telling the truth, and that his wife's case, Mrs. Betty John, the private secretary to an officer of the Lakeview State Bank, against himself for damages had nothing to it (42); that he, DeMund, only talked with her about twenty minutes (42); further that said George DeMund indicated to the grand jury while it was in sessions and that one witness (Donald Slighly), cashier of the Lakeview State Bank, was not telling the truth (42); further, that the said George DeMund did by gestures and conduct indicate that Slighly's testimony was not to be believed (42); that William Burke, assistant prosecuting attorney, instructed Dorothy Lindsey, the stenographer who transcribed the testimony, not to write down certain of his remarks (43); and further that William Burke was engaged by the officers of the Lakeview State Bank in numerous matters, particularly in regard to the floor plan loans to Ott Edrington which was the subject matter involved in the instant indictment (43).

The affidavit of Fred T. Stein sets forth that William Burke was employed by him regarding loans to Ott Ed-

rington which were involved in the matters investigated by the grand jury and also employed by deponent and by Tony Scalici (also indicted) in regard to a liquor license in Grand Rapids which was a matter investigated by the grand jury (36); that he was again employed in a Twenty-three Thousand ($23,000.00) Dollar loan to Ott Edrington and drew papers for the transaction (37); that further he is advised and believes that Ott Edrington was promised leniency and that his bond was reduced pursuant to his promise to the prosecutor (38).

The later affidavit of Fred T. Stein sets forth the detailed statement by William Burke, the assistant prosecutor who appeared before the grand jury, that Mr. Jackson, of the Michigan Attorney General's Office, had insisted to the grand jury that it bring out other and further indictments, and that the other prosecuting officers also insisted upon further indictments (39).

The affidavit of John D. Pichitino states that William Burke was consulted as an attorney by the officers of the Lakeview State Bank and that he did reveal to said Burke confidential information concerning matters which were investigated by the grand jury.

The affidavits of William Burke in opposition to the motion admit the representation of Mr. Scalici (44), denies receipt of certain information but does not deny that information was not of importance to the matter which he was then handling; admits the representation of Mr. Scalici in regard to the acquisition of Club Villa; and admits that he did extricate Mr. Scalici from his difficulties in this matter; he denied the question of *detailed* information which was of importance in securing the liquor license. Mr. Burke's second affidavit (55) sets up that he is a member of the law firm of Mallison and Burke and that the matters which were here involved were handled by the firm of *Mallison and Burke* and not by *Mr. Burke individually.* He admits that the firm handled the loan of Eighteen Thousand ($18,000.00) Dollars to Ott Edrington, that he handled a foreclosure for Mr. Stein and then admits that on competent advice after the indictment of Mr. Stein by reason of that advice, he individually ceased to represent Mr. Stein; that he turned the matter over to Mr. Mallison, his partner. In Mr. Burke's

third affidavit (56-57) he admits that the matters referred to him by Mr. Pichitino as president of Lakeview Bank would be handled by the firm and not by himself individually. That the information revealed to Mr. Burke related to the conduct of personnel of the Lakeview State Bank and had to do with the ability of the persons discussed to handle the tasks assigned to them, all of which concerned matters investigated by the grand jury and directly concerned the subject matter of the indictments.

These affidavits were not otherwise denied or controverted.

Hon. Blaine W. Hatch instructed the grand jury in part (17):

> "That the investigation of said crimes and offenses thus far has been carried on and conducted by the use of ordinary and usual lawful methods employed in criminal investigations, and that notwithstanding the diligent use of said lawful methods, the prosecuting attorney has been *blocked by certain persons and certain obstacles* from obtaining the facts necessary to ascertain if the said offenses and crimes had been committed * * *."

Said Circuit Judge further charged (17):

> "It is because of *these facts* that I, as one of the Circuit Judges of Calhoun County, have yielded to the request of the prosecuting attorney and directed the calling of the grand jury * * *."

Judge Hatch further charged the grand jury (20):

> "That the prosecuting attorney and the law enforcement officers have by use of the usual lawful methods of investigation been *blocked by certain persons and certain obstacles* from obtaining the facts necessary to ascertain if said alleged crimes and offenses had been committed * * *. The alleged crimes and offenses, particularly mentioned in the petition of the prosecuting attorney, have to do largely with the conduct of certain officers and employees of the Lakeview State Bank, and the operation of said bank, and I suggest that you first confine your investiga-

> tion to those matters. * * * You should not let the thought of cost or expense deter your action. We do not want the time to ever come in this County when a man may be able to escape punishment for his criminal actions because of wealth or influential friends, or because of the difficulty or expense. * * *."

Because of the Court's refusal to permit the taking of testimony (61, 62, 64, 65, 68, 69, 70, 71, 73, 76) or the swearing of most of the witnesses offered counsel were unable to prepare a "special record" under Michigan Court Rule 37, and instead were permitted only to make an offer of proof. The offers of proof with reference to the actions by the prosecuting attorney, George DeMund, are detailed and showed a deliberate attempt to influence, direct and control the action of the grand jury (69, 70, 62, 63).

The lower court apparently acted upon the belief that the taking of testimony at all, on a Motion to Quash, was clearly discretionary with the Court (68).

A specific offer of proof was made to show that the assistant prosecuting attorney had been retained by private interests (71) relative to the examination of all matters pertaining to the bank and was retained by one Mary Cleary (71) (a large stockholder in the bank) for that purpose, which was the identical subject matter involved in the instant indictment (71).

Further offer of proof was to the point that William Burke prepared bankruptcy schedules for one Robert Cantine representing the bank and Robert Cantine (70); that said Burke arranged for percentage settlements with the creditors and closed all these matters through for Robert Cantine (70); that he represented Ott Edrington in certain matters in connection with the car dealings at the bank and in connection with their transactions and was paid attorney fees, or charged for them (71). The lower court held such testimony was inadmissible (71).

Further offers of proof were made as follows: by the grand jurors to show that the prosecuting attorney, George DeMund, suggested what effect should be given to the testimony of witnesses before the grand jury; that George DeMund made an opening statement to the grand jury

which was prejudicial to defendants and influenced the deliberations of the grand jury; that he prevailed upon the grand jury to fail to indict certain witnesses who were charged in indictments as being co-conspirators; that he consulted with divers members of the grand jury relative to the Betty John suit against him and by words, conduct and gestures showed his displeasure at the testimony of certain witnesses and disparaged and belittled the testimony of certain witnesses thereby influencing the grand jury to believe that the testimony of certain witnesses was not to be believed (62-63).

A further offer of proof was made to show that the Circuit Judge received indictments at improper times and places in violation of law (65, 66, 67, 68, 83, 84, 84); that the sessions of the grand jury were held without journal entries being made therefor; that Harry W. Jackson, Assistant Attorney General, attempted to influence and direct the deliberations of the grand jury, and insisted upon additional indictments being returned (64).

An offer was made to prove by the testimony of prosecutor George DeMund that he made an opening statement to the grand jury in which he expressed certain views to the grand jury relative to fact questions (69); testimony was offered relative to the reduction of bonds of witnesses, Ott Edrington in particular (69); testimony relative to his conversations with the members of the grand jury relative to the Betty John case was offered (69); proof was offered concerning his attempts and discussions and conduct to influence the action of the grand jury (69); concerning the visits by Edrington at DeMund's cottage; that he reported to the grand jury that no indictment should be brought against Ott Edrington (alleged as a co-conspirator in the indictment) so as to obtain a friendly witness (70); to show that no probable cause existed to call a grand jury (72); to show the nature of the oaths administered; to show his individual advice given to individual grand jurors from time to time; that indictments were presented to the *judge rather than being present in open Court* (82); that he consulted with the foreman of the grand jury and consultations were held between the foreman and the Circuit Judge for long periods of time (72); that information and advice were given to the grand

jury by the judge and by the prosecutor (72); that discussions were had with the prosecuting attorney relative to a Betty John case (69); that conversations were had relative to eliminating Edrington from being indicted so as to secure a friendly witness (60); relative to his expressions of opinions as to the guilt of particular individuals (See also pages 74-75).

Testimony was introduced by Deputy County Clerk Mehler which showed that at the session of the grand jury in the court room February 14th, when the instant indictment was returned, that the doors were closed and that there was an officer at the time the indictment was returned at the door (87-88) and that the indictment was not received in open court in accordance with law.

In general the offers of proof covered in minute detail the various matters alleged in the motion to quash.

THE QUESTIONS PRESENTED

(1) There was a denial of due process because the lower court disregarded and refused to consider competent proof of misconduct before the grand jury involving improper influence, direction and control of the grand jury.

(2) There was prejudicial error and a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and a denial of due process as required by said section where there was an attorney-client relation between the indicted defendant and the prosecutor appearing before the grand jury which vitiated the indictment and denied petitioner of his rights to due process of law.

(3) That there was a denial of due process of law in that the determination of the State Court holds that information given confidentially by a client to his attorney may be thereafter used by the same attorney after he is appointed assistant prosecutor to obtain an indictment against him before a grand jury.

(4) That there was a denial of due process of law in that the indictments were not received in open court as re-

quired by law. That there was a closed session with the door locked and an officer at the door excluding the public.

(5) That there was a denial of due process of law in that the Circuit Judge instructing the grand jury made a prejudicial and inflammatory charge singling out the petitioner in such a manner as to clearly identify him, even though his name was not mentioned in the charge.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(1) Substantial Federal questions are presented with respect to the scope of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) In this case, petitioner has been denied due process of law as set forth in said amendment. His privileges and immunities have been abridged. He was fully as much entitled to be fairly charged as to be fairly tried and is entitled to the protection of the amendment. It was not for the prosecutor to try the petitioner before the grand jury.

(3) There is a denial of due process of law in that it was shown conclusively that the prosecuting attorney, George DeMund, exercised such improper influence, direction and control over the grand jury as to vitiate all of the indictments returned and that he improperly sought to influence the testimony of witnesses appearing before the grand jury and improperly disparaged and belittled the testimony of witnesses who appeared before the grand jury. In certain instances, exact quotes of the prosecutor's remarks are included in the affidavits, on personal knowledge, and the offer of proof covered the fact in minute detail. The conclusion by the Michigan Court that the affidavits were based upon information and belief and state conclusions and inferences not based on fact is clearly not supported by the record. Similar conclusions by the lower court concerning the action of William Burke, assistant prosecutor, are not supported by the record because on the hearing the lower court pointed out "the question is thoroughly raised in the affidavits" (61). Elsewhere:

> "I think it raises that question entirely so that you can thoroughly present it to this court or any other court" (60).

(4) The record further shows that petitioner was denied due process of law in that it was established that William Burke, assistant prosecutor, was disqualified from appearing before the grand jury by reason of an attorney-client relation which existed not only between the indicted defendants and the said Burke who attended the grand jury, said relations having had reference to the identical subject matter investigated by the grand jury, but further that he was retained by a private individual (Mary Cleary, a large stockholder of the bank). Being retained by an individual to make the same investigation as that made by the grand jury was a flagrant disregard of the requirement that a person be fairly charged as well as fairly tried.

(5) The oath of secrecy administered to court attaches, court reporters, prosecutors, was interpreted by the Michigan Supreme Court to bar a showing of misconduct before the grand jury which denied petitioner of his right to due process of law.

(6) That petitioner was further denied due processes of law in that the indictments were admittedly not received in open court and the action was clearly in violation of the statutory and common law requirements as to reception of grand jury indictments and clearly was not in accordance with the requirements of due process. Even by consent of the defendants, the court would not have jurisdiction to proceed, because, as has been said, the State has an equal interest in seeing that accused persons are properly charged.

(7) There is a denial of due process in that in the charge of the lower court to the grand jury it singled out the Lakeview State Bank (a corporate person), its officers and employees. The defendant Pichitino and defendant Donald C. Slighly were the only two officers involved, and obviously were the persons of wealth and influence referred to in the charge and the ruling by the Court that there had been an obstruction and blocking of justice, which when taken with a plea that no man should be able to escape punishment because of wealth or influential friends was clearly inflammatory; coming from the mouth of a Circuit Judge whose instructions a petit jury is bound

to follow it denied petitioner of his right to be fairly charged.

Respectfully submitted,

ALFONSO A. MAGNOTTA of Albion, Michigan.

ROGER H. NIELSEN of Battle Creek, Michigan.

Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. .....

JOHN D. PICHITINO,

Petitioner,

vs.

STATE OF MICHIGAN,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of the State of Michigan is reported in 337 Michigan Reports, page 90 and incorporated in the certified record. The order of the Supreme Court of Michigan denying motion for rehearing is incorporated in the certified record in support of this Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this court is invoked under Title 28, Section 344, United States Code Annotated, being Section 237 of the Judicial Code and Rule 38 of the Rules of the Supreme Court of the United States for a Writ of Certiorari to the Supreme Court of the State of Michigan, to review the judgment filed on the 8th day of June, 1953, affirming the indictment of Petitioner and to review the order entered by the Supreme Court of the State of Mich-

igan on October 5th, 1953, denying Petitioner's motion for re-hearing to said Court.

The said Supreme Court of Michigan has decided a federal question of substance not heretofore determined by this Court and/or has decided it in a way not in accord with applicable decisions of this Court.

STATEMENT OF THE CASE

The pertinent facts have been set forth in detail in the Petition for Writ of Certiorari under the title of "Summary Statement of Matters Involved."

ERRORS RELIED UPON

The Michigan Courts denied Petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States in that:

A.

The Michigan Courts refused to allow Petitioner to introduce testimony in support of motion to quash indictment wherein Petitioner sought to prove misconduct on the part of the Prosecuting Attorney before the grand jury involving improper influence, direction and control of the grand jury.

The Michigan Courts disregarded and refused to consider competent proof of misconduct before the grand jury involving improper influence, direction and control of the grand jury by the Prosecuting Attorney.

The Michigan Courts refused to allow Petitioner to introduced testimony in support of motion to quash indictment wherein it was sought to prove that the grand jury prosecutor had been retained by a private interest and further that the grand jury prosecutor was disqualified from appearing before the grand jury by reason of an attorney-client relationship with this Petitioner and with all other persons indicted by the grand jury.

B.

The Circuit Court administered to the witnesses, prosecutors, and court attaches an improper and illegal oath

of secrecy, which intimidated the witnesses and prevented Petitioner from showing the improper conduct of the Prosecuting Attorney before the grand jury.

C.

The Circuit Judge received the purported indictments returned by the grand jury at improper times and places.

ARGUMENT

A.

PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW BECAUSE OF THE MICHIGAN COURTS' DENIAL OF PETITIONER'S RIGHT TO INTRODUCE EVIDENCE TO SHOW IMPROPER CONDUCT ON THE PART OF THE PROSECUTORS BEFORE THE GRAND JURY, CONFIDENTIAL RELATIONS BETWEEN AN ASSISTANT PROSECUTOR AND PETITIONER, AND THE FACT THAT THE ASSISTANT PROSECUTOR REPRESENTED A PRIVATE INTEREST IN AN INVESTIGATION INTO THE SAME TRANSACTIONS UPON WHICH THE INDICTMENT WAS BASED.

There was a denial of due process under the Fourteenth Amendment to the Constitution of the United States because the Courts of Michigan disregarded and refused to consider competent proof of misconduct before the grand jury involving improper influence, direction and control of the grand jury, because the Courts of Michigan disregarded and refused to consider competent proof that there was an attorney-client relationship between the indicted Petitioner and the Prosecutor appearing before the grand jury which vitiated the indictment and denied Petitioner his right of substantive due process of law, and because the Court of Michigan refused to consider competent proof that the said Prosecuting Attorney was at that time representing a private stockholder in the Lakeview State Bank in an investigation into the same affairs of the bank which became the basis of the indictments.

The Supreme Court of Michigan, in sustaining the finding by the lower court, quoted with approval the following extract from the lower court's finding:

> "While defendants, in their affidavits as filed with said motion to quash and the ones introduced at the hearing on said motion, seem to insinuate, may we say, a great many acts on the part of the Prosecutor and his assistant, which if true, might be considered improper conduct, however, a study of said affidavits will reveal that most of the affidavits are based upon information and belief, and those that are not, merely state conclusions and inferences of misconduct, and are not based upon facts; and that such matters as are based on facts, are not of such a character that the Court can say that improper direction and control was exercised over the grand jury so as to vitiate their indictments." 337 Michigan Reports at 96.

On pages 60 to 62 of the Record, in connection with the proceedings on the hearing of the motion to quash in the lower court, this defendant sought to introduce testimony which would eliminate any possible objections to the affidavits (raised by the lower court) and was prevented from so doing. The Record in this regard is pertinent. We quote from pages 60 to 62 of said Record:

> "On the question of admitting Mr. Burke's testimony in support of the plea that he was disqualified to appear before the Grand Jury and whether the affidavits on file squarely raised all of the facts involved the Court pointed out * * *:
>
> "'THE COURT: * * * If it is, then I think that that point that you're attempting to raise there has been fully covered. I think it raises that question entirely so that you can thoroughly present it to this Court or any other Court.
>
> "'MR. MAGNOTTA: There is the question of additional representation of other persons.
>
> "'THE COURT: That's merely accumulative. If the fact that he is disqualified because

he represented Mr. Stein or represented these other gentlemen — what is his name?

"'MR. MAGNOTTA: Slighly or Mr. Pichitino?

"'THE COURT: Yes, and of those. That's all raised at the present time. If you just raise one or two of those if that disqualifies him it disqualifies him just as much on one as it does on the other. It would be merely accumulative and I can't understand why we should take the time to take testimony on that when you have got that thoroughly covered by affidavit.'

"Also:

"'THE COURT: It is true, Mr. Magnotta, that that question is already covered by a number of instances in affidavits. This is merely accumulative any way of that question. The question is thoroughly raised in the affidavits. If you're correct in your contention that it was wrong for him to take part in the Grand Jury proceedings it is properly raised by the affidavits on file.

"'MR. MAGNOTTA: Excepting this, as Mr. Cobb indicated, if he received compensation from anyone to further his own interests in the prosecution of a person — I'm not saying he did or didn't — I don't personally know, but that in and of itself would disqualify him. If he were disqualified then he would be an unauthorized person before the Grand Jury and if he is an unauthorized person before the Grand Jury it would vitiate all the indictments.

"'THE COURT: That's possible; I understand your contention.'"

The defendant squarely sought to show that Mr. Burke received compensation from persons to further his own interest in the prosecution of defendant, and the lower court held that anything further along this line would be

merely accumulative. The lower court refused to permit testimony on the ground:

> "I think it (the affidavits) raises that question entirely so that you can thoroughly present it to this court or any other court."

The denial of permission to introduce proof to show a denial of due process cannot be made the basis of a decision that no proof has been made. The net effect of the decision is to say to Petitioner:

> "This court is not going to allow you to show misconduct by its officers. And, because you have shown no proof, your motion is hereby denied."

This type of injustice was condemned by the United States Supreme Court in *Carter vs. Texas,* 177 U. S. 42, in which the Court said:

> "It thus clearly appears by the record that the defendant, having duly and distinctly alleged, in his motion to quash, that all persons of the African race were excluded, because of their race and color, from the grand jury which found the indictment, asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain that allegation; and that the court refused to hear any evidence upon the subject, and overruled the motion, without investigating whether the allegation was true or false.
>
> "The defendant having offered to introduce witnesses to prove the allegation in the motion to quash, and the court having declined to hear any evidence upon the subject, it is quite clear that the omission of the bill of exceptions to give the names of the witnesses whom the defendant proposed or intended to call, or to state their testimony in detail, cannot deprive the defendant of the benefit of his exception to the refusal of the court to hear any evidence whatever. And the assumption, in the final opinion of the state court, that no evidence was tendered by the defendant in support of the allegations in a motion to

quash, is plainly disproved by the statements, in the bill of exceptions, of what took place in the trial court.

"The necessary conclusion is that the defendant has been denied a right duly set up and claimed by him under the Constitution and laws of United States; and therefore the judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.'

In *Quinn vs. United States,* 203 F. 2d 20, Bazelon and Edgerton, JJ., joined in a concurring opinion. It is said at page 31 of that opinion:

"A motion to quash an indictment should not, of course, be granted merely on legally sufficient allegations. The movant cannot insist that his allegations stand admitted in the absence of a denial. * * * But where it appears from the affidavits in support of legally sufficient allegations that their factual basis is not clearly frivolous and the movant seeks a hearing to prove them, it is reversible error to cut him short. *Carter vs. Texas,* 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839. See also, cases cited in note 40, supra." (Note 40 cites *Martin vs. Texas,* 200 U. S. 316; *Brownfield vs. South Carolina,* 189 U. S. 426; *Smith vs. Mississippi,* 162 U. S. 592; *Glasser vs. United States,* 315 U. S. 60).

The concurring justices also state, at page 28:

"* * * The Supreme Court has long included the grand jury within the scope of the Fourteenth Amendment's equal protection clause, even in the absence of prejudice to an individual defendant." See also, *Glasser vs. United States,* supra, citing *Carter vs. Texas,* supra. See also, *Attorney General vs. Pelletier,* 240 Mass. 264, 309, where at page 309 the Court said:

"It would be a mockery of constitutional rights and obligations to permit the District Attorney, because of his presence with the Court, to secretly exercise a control which the Court is forbidden to exercise even openly."

See also: *Mamaux vs. U. S.*, 264 Fed. 816:

> "The record does not indicate that any evidence whatever was introduced in support of the motion. Nevertheless, *had such evidence been offered and rejected, the denial would,* on the concession before made, *constitute reversible error.* Carter v. Texas, 177 U. S. 442, 448, 20 Sup. Ct. 687, 44 L. Ed. 839."

Martin vs. State, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497:

> "Nevertheless, if, upon the hearing of the written motion to quash the indictment * * * if the trial court had refused to admit evidence to prove them we should not hesitate to reverse the judgment."

And see authorities therein cited.
See also *Edwards vs. U. S.*, 312 U. S. 473, 61 S. Ct. 669.

And in *Commonwealth vs. Harris,* 231 Mass. 584, 121 N. E. 409, it is said:

> "The words 'By the law of the land,' as used originally in Magna Charta in reference to this subject are understood to mean due process of law, that is by indictment or presentment of good and lawful men, and goes on to declare that: The rights of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by presentment and indictment of a grand jury, in cases of high offense, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecution, and as one of the ancient immunities and privileges of English liberties.
>
> "The above quotation is a declaration and decision * * * that it shall no longer be possible for one or more judges to compel or direct the examination of a witness to be held in open court before the grand jury should the judges seek to overawe the latter or the witness by the presence of other witnesses or bystandards, or should he or they be of the opinion the

prosecution is too indulgently or too vindictively conducted. (Citing authority) * * *."

See also, *Coblentz vs. State,* 164 Md. 558, 166 Atl. 45, where it was held that the presence of an attorney appointed as assistant counsel for the state under a statute providing such appointment "to aid in the trial of criminal cases," which was construed as not authorizing the attorney to enter and be present in the grand jury room while they were investigating a case, was held to invalidate the indictment, where it appeared that the attorney in question had retained by others in litigation concerning practically the same subject matter as that of the grand jury investigation, and it was apparent it would further the interest of his client to have the criminal charge maintained, the court stating that it was not necessary for the accused to plead and show injuries from the conflict of interest.

See also *Nicholls vs. State,* 17 Ga. App. 593, 87 S.E. 817.

That an attempt upon the part of the Prosecuting Attorney to influence the grand jury to bring an indictment will vitiate the indictment is supported by a vast array of authorities. See, among others, 24 *Amer. Juris.,* page 861, Title Grand Jury, Sec. 40; *Gitchell vs. People,* 33 N.E. 757 (146 Ill. 175); *Attorney General vs. Pelletier,* 134 N.E. 407, 240 Mass. 264, *Supra; Blake vs. State,* 14 Pac. 2d, 240, at page 242, 54 Okla. Cr. 62; 17 *Cyc.* page 1192-1193; *LeBarron vs. State,* 65 So. 648, at 649, 107 Miss. 663; *State vs. Adam,* 5 So. 30, at 31, 40 La. A. 745; *Miller vs. State,* 28 So. 208, at 210, 42 Fla. 266; *Commonwealth vs. Bradney,* 17 Atl. 600, 126 P. 199; *State vs. Addison,* 2 S.C. 356 (Syll.); *In re District Attorney of the United States,* 7 Fed. Case #3925; *State vs. Crowder,* 193 N.C. 130 S.E. 337 at page 338; *In Williams vs. State,* 123 N.E. (Ind.) 209, 188 Ind. 283; a leading case is *United States vs. Wells,* 163 Fed. 313. See also, cases cited therein.

The holding of the Michigan Courts denied Petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States in that they refused him the right to introduce testimony concerning the improper conduct of the Prosecuting Attorney, as well as depriving him of the right to show by evidence that Mr. DeMund, the chief prosecuting attorney, had a pecuniary interest

in the outcome of grand jury proceedings in that he was involved as party defendant in a civil suit brought by the secretary to Mr. Slighly, one of the defendants indicted. Moreover, Petitioner sought to show by evidence that Mr. DeMund referred to this case in a private conversation with a member of the grand jury during the recess of the grand jury proceedings. Petitioner sought further to show that improper offers of immunity had been made to prospective witnesses and that the Prosecutor illegally consorted with prospective witnesses before the grand jury and particularly with one Ott Edrington.

There is no authority granting immunity to witnesses before the grand jury and it appears that the legislative intent in Public Act 311 of the Public Acts of 1949, as shown by excerpts from the Senate and House Journals embodied in the record herein, was that there should be no immunity from prosecution given to witnesses before the three-man grand jury. Both the trial court and the Supreme Court of Michigan failed to recognize that the important question is not whether the jury were in fact influenced, but that an attempt to do so would alone vitiate the indictment. Petitioner's offers of proof here are ample to establish that Mr. DeMund's conduct before the grand jury was most improper and that Mr. Burke, the Assistant Prosecuting Attorney, because of his confidential relationship with all of the defendants, was an improper and unauthorized person before the grand jury. Mr. Burke's affidavit in denial merely set forth that his law firm of Burke and Mallison and not he himself handled the affairs for the defendants. Such an argument is casuistic and meretricious.

No objection was made to the form of the affidavits at the time they were offered; they were considered by the Court properly to raise all of the question presented for the lower court or for any other court.

On pages 95 and 96, 337 Michigan Reports, it is stated:

> "Defendants complain of the Court's refusal to allow them in support of their motion to quash to introduce the testimony of members of the grand jury, the circuit judge, court reporters and court attaches, concerning the conduct of prosecuting officers before the grand jury and the manner in which the work of the grand jury was handled. * * *"

The Supreme Court of Michigan sustained the theory of the trial court's action as correct under the statutory provisions and certain cases cited. Neither the cases nor the statute involve, in any way, the action of a prosecuting officer outside of the grand jury room. It was Mr. Burke's action outside of the grand jury room that was sought to be established, not "the way the work of the grand jury was handled." The purpose of such offers has been completely misunderstood by the Michigan Courts.

The purpose of that offer was to show that Burke, by reason of his activities beyond the grand jury room, was disqualified from appearing before the grand jury. This had nothing to do whatsoever with the conduct of the grand jury itself.

By the same token, it was sought to show the conduct of other court officers and attaches beyond the grand jury room, having no connection with the grand jury process in any way, to show that the persons were not proper persons to appear before the grand jury. The Michigan statute relative to grand jury secrecy cannot be said to have anything to do with limiting such a showing.

At pages 96 and 97 of the Supreme Court of Michigan's opinion, there is a statement supporting that of the trial court, concluding that the record does not prove that one of the prosecuting officers had formerly represented the bank involving the same facts as those supporting the indictments involved in the criminal proceedings. This conclusion is in entire disregard of the offer of proof and actually disregards the affidavit to the effect that Assistant Prosecutor Burke *had represented the defendant individually in consultations involving the identical subject matter* which was the basis of the grand jury indictments. All that can be concluded is that the trial court completely disregarded the uncontradicted, undisputed affidavits and offers of proof. No other conclusion can be reached. The offer of proof is as follows: that Burke had been retained and paid by private interests (Mary F. Cleary) to investigate the same subject matter (70-71). This was determinative of the question.

B.

PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW BECAUSE THE LOWER COURT ADMINISTERED AN ILLEGAL AND IMPROPER OATH TO WITNESSES, PROSECUTING ATTORNEYS, AND COURT ATTACHES.

The Petitioner was deprived of substantive due process of law because the lower court caused an improper oath to be administered to witnesses and court attaches. The oath required was as follows:

> "You do solemnly swear that the testimony you shall give before the grand jury in the matters under investigation shall be the truth and nothing but the truth, and further, that you will keep secret everything which transpires in the grand jury room, so help you God."

There is no statutory authority for the administration of this oath. The lower court in his finding, see Record page 116 and 117, justifies the administration of this oath as follows:

> "While the Michigan Statute provides no oath, to be administered to the witnesses, the Prosecuting Attorneys and court attaches, such an oath is necessary to preserve the secrecy of the grand jury proceedings, for if the Prosecutors, court attaches and witnesses were allowed to divulge the secrecy of said proceedings, there would be no need of the oath to the jurors and it would be an absolute nullity.
>
> "The Court did therefore, upon the authority as presented by Judge Gillespie, in his work on Michigan Criminal Law and Procedure, administer oaths for secrecy to the officers in charge of the grand jury, the official stenographer for the grand jury and other court attaches who had functions to perform in behalf of the grand jury, and in its charge required the foreman of the grand jury, the Prosecuting Attorney, Assistant Prosecuting Attorney, or other prosecuting officers, to administer the following oath to each witness who appear before the grand jury, to-wit: (Quoting oath, supra).

> "That an oath was required of witnesses who appeared before the grand jury to testify, there can be no doubt, as Section 28.950 of the Michigan Statutes Annotated provides for the administration of an oath, but does not set forth the form of oath required. However, the Court allowed the form suggested by Judge Gillespie in his work on Michigan Criminal Law and Procedure at page 114, Section 106, which was the form of oath formerly required by Act 284 of the Public Acts of 1931 providing for grand juries in Counties of 200,000 population. While said Act was repealed by Act 31 of the Public Acts of 1931, the oath therein set forth is some indication of what the Legislature of the State considered was a proper oath to be administered to witnesses in such proceedings." See Record page 116 and 117.

The Supreme Court, 337 Mich. Reports at page 97, held as follows:

> "Defendants complain of the court's having required the grand jurors to administer an oath of secrecy to witnesses and court attaches appearing before it. CL 1948, § 767.9 (Stat. Ann. § 28.949), requires such oath of grand jurors. The legislative intent that grand jury proceedings be secret is manifest. The oath complained of is consistent therewith and in nowise violated the rights of the defendants. *People vs. Thompson*, supra."

Petitioner submits that these holdings deprived him of due process of law. While Petitioner believes that the statute setting forth the oath to be administered to grand jurors is improperly applied to its administration to court attaches and witnesses, if the holding of the Supreme Court can be said so to extend it, then the statute is unconstitutional. Petitioner is deprived of his right to show improper conduct on the part of the Prosecutor. We are unable to find a similar holding in any other state. The oath administered to the grand jurors is designed merely to keep secret "your own counsel and the counsel of the people, and of your fellows." Petitioner's offer of proof

related merely to extraneous conduct on the part of the Prosecutors.

1 Bishop, *Criminal Procedure* (3 Ed.) Sec. 857, states:

> "Where these reasons have ceased to operate, it is the better opinion, contrary perhaps to some cases, but maintained in most, that any revelations of the grand jury's doings which justice demands, may be made. The witness may be the prosecuting attorney or a third person present, a grand juror himself, or one who gave evidence before the grand jury, who may be even required to state what his own testimony was."

In the recent text book by Orfield — *Criminal Procedure* published by the National Conference of Judicial Councils, it is pointed out at page 168:

> "The rule as to secrecy is subject to limitations. After an indictment has been made public, the need for secrecy is largely gone, and justice may require disclosure of some phases of the investigation. It has been held that a grand juror may testify whether or not a certain person was examined by that body; or a witness before the grand jury swore to facts different. * * * Likewise, a juror may be a witness to prove facts extrinsic to the evidence considered by the panel, such as the misconduct of a grand juror of another person, the presence of one not a member, and similar matters. Some cases go so far as to permit disclosure, whenever in the court's discretion justice demands it. This is the position recommended by the American Law Institute Code of Criminal Procedure."

An examination into the case law in this country demonstrates that the imposition of such an oath of secrecy upon witnesses is a flagrant violation of the rights of the Petitioner in this proceeding. It is pointed out in 24 *Am. Jur.* Grand Jury, Sec. 49, page 867:

> "The rule of secrecy concerning matters transpiring in the Grand Jury Room, it has been said, is not designed for the protection of witnesses before the Grand Jury, but for that of the Grand Jurors, and

in furtherance of the public justice. The witness has no privilege of having his testimony treated as a confidential communication, but must be considered as testifying under all of the obligations of an oath in a judicial proceeding, and hence, his testimony may be disclosed wherever it becomes material to the administration of justice; otherwise, witnesses before the grand jury would be tempted to commit perjury without fear of punishment, grand jurors would have no credible evidence on which to act, on the one hand, and the citizen, on the other would be deprived of one of his most boasted and valuable protections against arbitrary accusation and arrests."

Mr. Wigmore, in his work on Evidence, Sec. 2362, points out:

"There remain, therefore, on principal, no cases at all in which, after the grand jury's functions are ended, the privilege of the witnesses not to have their testimony disclosed should be deemed to continue. This is, in effect, the law as generally accepted today. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required 'whenever it becomes necessary in the course of justice.' Disregarding a few local exceptions, this is in practice no narrower a rule than the one above deducible from principle."

The same author disposes of the notion that the two exceptions contained in many statutes should be held to exclude all others. He says:

"It is now universally conceded that a witness may be impeached, in any subsequent trial, civil or criminal, by self-contradictory testimony given by him before the grand jury. In the same way, a party to the cause, not on the stand as a witness, may be impeached by his admissions made in testifying before the grand jury. The occasional statutory sanction for the former of these uses cannot be construed to prohibit the latter, which goes upon the same reasoning. Nor should any of the ensuing legitimate purposes of disclosure be considered to be obstructed

by the statutory omission to mention them — else the integrity of common-law principles would tend to be diminished in direct ratio to the ignorance or unskillfulness of the legislature which attempted in any respect to make a declaratory statute." 4 *Wigmore on Evidence,* Sec. 2363.

See also, *State vs. Campbell,* 73 Kan. 688, 85 P. 784, 9 Anno. Cases, 1203 at P. 1211; *United States vs. Kilpatrick,* 16 Fed. 765 at page 773; *People vs. Goldberg,* 302 Ill. 559, 135 NE 84; *State vs. Fish,* 90 N. J. L. 17, 100 Atl. 181; *State vs. Will,* 97 Ia. 58, 65 NW 1010; and *State vs. Coffee,* 16 Atl. 151, 56 Conn. 399.

The oath here provided is in effect a direct violation of the Constitutional rights of the Petitioner. The statutes do not provide for such an oath with relation to the common-law grand jury; in fact, no oath is provided. Certainly, there is no authority to prohibit the Defendants from inquiring from witnesses as to what they knew concerning matters under investigation by the grand jury. The very provisions, as was pointed out to the Court, of the statute relative to indorsement upon the indictment or information of names of witnesses was for the express purpose of granting to one accused of crime a basic right which would allow the Petitioner and his counsel to interrogate those witnesses to ascertain from them what knowledge they may have concerning the charge made. It places unwarranted obstacles on a defendant seeking to prepare his case for trial.

C.

PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW BECAUSE THE PURPORTED INDICTMENT WAS RECEIVED AT AN IMPROPER TIME AND PLACE, AND NOT IN OPEN COURT AS REQUIRED BY LAW.

Indictment of Petitioner in Pursuance to a Presentment by a Grand Jury at improper times and places not in accordance with the law is denial of due process under Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

The Circuit Judge received the indictment herein at an improper time and in an improper place, to-wit: in the grand jury room itself, instead of in open court. The learned Circuit Judge has admitted in his finding that the instant indictment was in fact received in the grand jury room "to observe the secrecy thereof", (123) and other evidence was introduced and offered to prove that a deputy sheriff stood guard at the only entrance to said grand jury room so that the public would be excluded (85-88).

In 42 *C. J. S. Indictments and Information,* Sec. 28 Return on Presentment, on page 877, it is said:

> "It is essential to the validity of an indictment that it be presented or returned by the grand jury. A failure to make the return or presentment in open court or during the life of the grand jury, is fatal; but this result does not in all cases follow lack of strict compliance with *other* common law or statutory requirements." (Emphasis supplied).

It is further stated:

> "The finding by the Grand Jury of a true bill, and an indorsement thereon to such effect are not alone sufficient to render it valid as an indictment; but it is further necessary that the bill shall be presented by the grand jury during its term of service. Except where it is provided otherwise by statute, the return or presentment must be made in open court, and while the Court is in session; that is, it must be made in the court room or in the place where the court is being held open to the public with the judge and clerk present; and the delivery of the indictment to the clerk of the court while the court is not in session, by the foreman or bailiff is not sufficient. The return of an indictment is naturally made to the court and at the session where the grand jury is performing its function. * * *"

> "To render an indictment valid, it must in some manner appear affirmatively from the record that it was returned as a true bill by the grand jury in open court."

See also, *State vs. Vial,* 153 La. 883, 96 So. 796; *Zugar vs. State,* 194 Ga. 295, 21 S.E. 2d 647; *Meredith vs. Commonwealth,* 201 Ky. 809, 258 S.W. 686; *State vs. Horn,* 336 Mo. 524, 79 S.W. 2d 1044; *Renegar vs. U. S.,* (Va.) 172 F. 646, 97 CCA 172; *Angle vs. U.S.* (Va.) 172 F. 658, 97 CCA 184; *Sampson vs. State,* 124 Ga. 776, 53 S.E. 332.

In 27 *Am. Jur. Indictments and Information,* Sec. 31, it is said:

> "It is the general if not universal rule that an indictment, in order to be a legal accusation, must be brought into open court that is, it must be returned into court while the judge is presiding * * *"

The cases are practically unanimous in holding that an indictment, in order to be a legal accusation, must be brought into open court.

In *Renegar vs. United States,* 172 Fed. 646, 97 CCA 172, in holding that an indictment must be returned into open court while the Judge is there presiding, the court exhaustively reviewed the authorities, saying:

> "1 Chitty, Crim. Law, 324 describes the mode in which the grand jury returns the results of their inquiries to the court, by endorsing 'A True Bill' if found, and 'Not a True Bill' if rejected and says:
>
> > 'When the jury have made these endorsements on the bills, they bring them publicly into court, and the clerk of the peace at sessions, or clerk of assize on the circuit, calls all the jurymen by name, who severally answer to signify that they are present, and then the clerk of the peace or assize asks the jury whether they agreed upon any bills, and bids them present them to the court, and then the foreman of the jury hands the indictments to the clerk of the peace or clerk of assize.'
>
> "4 Bl. Com. 306, also describes the functions of the grand jury and the methods of its proceedings, the necessity of twelve at least assenting to the accusation, and adds:
>
> > 'And the indictment when so found is publicly delivered into court.'

A later text writer (1 Bishop, Crim. Proc. 869) says:

> "When the grand jury has found its indictments, it returns them into open court, going personally in a body.'

"The compilation, 22 Cyc. Law & Proc. p. 210, cites cases from fifteen states to support the proposition in the text that the 'finding by the grand jury of a true bill and an endorsement thereon to such effect are not alone sufficient to render it valid as an indictment, but it is further necessary that the bill shall be presented or returned by the grand jury in open court.' It would unduly extend this opinion to cite all of these cases in this, the fourth circuit and first, as to the practice in the state of Virginia, where this case arose. * * * When the Constitution enumerated those guaranties intended for the security of personal rights, and among them that no person shall be held to answer for a capital or infamous crime unless on the presentment or indictment of the grand jury, it manifestly intended a valid indictment, found and presented according to those ancient rules and safeguards which the law and immemorial custom have provided for the conduct of grand juries. It did not mean a mere form of indictment, but it meant a formal accusation of the offense charged, of which at least twelve of the grand jury were satisfied of the truth, and publicly returned into court, indorsed as a true bill. Until and unless it is so presented, it is no indictment. The fundamental prerequisite to the trial of the defendant for the offense charged against him was an indictment by the grand jury. Every text writer, from Chitty and Blackstone down to Bishop and Joyce, is in agreement as to the manner in which indictments should be found. They all agree that, when the grand jury has acted upon the bills submitted to them, *they come publicly into court, their names are called, and the foreman hands the indictment to the clerk.* It is not without reason that this formality is required, and that the grand jury should be present when the indictment is presented to the court; for, before a man

can be held to answer for a capital or infamous offense, at least twelve of the grand jurors must agree to the finding of a true bill. If the grand jury is present when the presentment is made, their assent is conclusively presumed, unless something to the contrary appears. If they are not present, there can be no such presumption." (Emphasis supplied).

The Court there also said:

"In Com. vs. Cawood, 2 Va. Cas. 541, it said:

'The accusation in due and solemn form is as indispensable as the conviction. What, then, is the solemnity required by law in making the accusation? The bill of indictment is sent or delivered to the grand jury, who, after hearing all the evidence adduced by the commonwealth, decide whether it be a true bill or not. If they find it so, the foreman of the grand jury indorses on it "A True Bill," and signs his name as foreman, and then the bill is brought into court by the whole grand jury, and in open court it is publicly delivered to the clerk, who records the fact. It is necessary that it should be presented publicly by the grand jury; that is the evidence required by law to prove that it is sanctioned by the accusing body, and until it is so presented by the grand jury, with the indorsement aforesaid, the party charged by it is not indicted, nor is he required or bound to answer to any charge against him which is not so presented * * *,'".

See also, *Angle vs. United States*, 97 CCA 184, 172 Fed. 658; *Sampson vs. State*, 124 Ga. 776, 53 S. E. 332, 4 A. & E. Ann. Cas. 525; *Rainey vs. People*, 8 Ill. 71; *State vs. Glover*, 3 G. Greene 249; *State vs. Cox*, 28 N. C. (6 Ired. L.) 440; *Com. vs. Cawood*, 2 Va. Cas. 527; *Simmons vs. Com.* 89 Va. 156, 15 S.E. 386; *Hodges vs. Com.*, 89 Va. 265, 15 S.E. 513; *State vs. Heaton*, 23 W. Va. 773; *State vs. Quarles*, 13 Idaho 252, 89 Pac. 636; *Goodson vs. State*, 29 Fla. 511, 30 Am. St. Rep. 135, 10 So. 738; *McKenzie vs. State*, 24 Ark. 636; *Chancellor vs. State*, 33 Ark. 815; and *Shinn vs. State*, (Ark.) 124 S.E. 263.

The applicable statutes of the State of Michigan in this regard are as follows:

Section 27.464, M. S. A.:

> "The sittings of every Court within this State shall be public, and every citizen shall freely attend the same."

Section 28.963, M. S. A., *Indictment by Grand Jury; Concurrence of twelve jurors, certification*:

> "No indictment can be found without the concurrence of at least twelve (12) grand jurors; and when so found, and not otherwise, the foreman of the grand jury shall certify thereon, under his hand, that the same is a true bill."

Section 28.965, M. S. A. *Presentment, indorsement, filing and inspection*:

> "Indictments found by a grand jury, with the names of the complainant and all the witnesses indorsed on the back thereof, shall be presented by their foreman, in their presence, to the court, and shall there be filed and remain as public records; but such as are found against any person for a felony, not being in actual confinement, shall not be open to the inspection of any person except the attorney general or prosecuting attorney until the defendant therein shall have been arrested."

Sec. 27.548, M.S.A. *Temporary place of holding court; appointment by judge*:

> "Whenever it shall be deemed unsafe or inexpedient by reason of war, pestilence or other public calamity to hold any court at the time and place appointed therefor, or whenever there shall be no court house in any county, or when the court house shall for any cause be unsafe or unfit for the holding of any court, the judge or judges of the court may appoint any other place and time within the same county as a temporary place for holding such court. The place so appointed shall be deemed the court

house of the county for the time being, for all purposes connected with said court."

Sec. 27.549, M.S.A. *Order in writing, publication*:

"Every such appointment shall be made by an order in writing, signed by the judge or judges making the same, and shall be published by advertisement, or in such other manner as shall be required in the order."

In the instant case, as we have pointed out hereinabove, the Circuit Judge failed to hold court when receiving the indictments in the usual place for holding said court, to-wit, in the court room. Sec. 28.965, M. S. A., above-quoted, which refers therein to the fact that the indictment must be presented "by their foreman, in their presence, to the Court, and shall there be filed and remain as a public record;" can be understood to mean only that the indictment must be presented to the Court acting as a Court in the usual place for such action, the court room. The language following, "but such as are found against any person for a felony, etc.," obviously relate only to the filing and subsequent custody of the written indictment, and in no way qualify the meaning of the precedent independent clause relating to the manner of presenting the indictment to the Court.

Therefore, if the Judge desired, for good and sufficient cause, to hold Court at the time of the reception of this indictment at a place other than the alternate court room in the City of Battle Creek, the place of holding said court, it became incumbent upon the Judge then and there to abide by the before-quoted Sec. 27.548 and 27.549 of the Michigan Statutes Annotated. This the Judge manifestly failed to do, and, in receiving the indictment at a place other than the usual place for holding said court, the aforesaid alternate court room, ceased to act as a Court, and received the indictment entirely in violation of law, making the said indictment null and void.

It would under no circumstances have been possible for the Judge to receive the indictment in the Grand Jury Room, *unless that place were so designated for the holding of open court,* and unless *open court* were actually there in

session on the day and at the time the indictments were returned to the Judge.

It is to be noted that the Michigan statute above-quoted requires that the indictment shall be presented to the Court. This language can have no other meaning than that the indictment must be returned in *open* court. We should like again to reemphasize that "it must be made in the court room or in the place where the *court is being held open to the public* with the clerk and judge present;" (emphasis supplied). There certainly can be no contention in the instant case that the return of the indictment was made in a "place where the court was being held open to the public with the clerk and judge present."

Indeed, it is the contention of defendants that the indictments were not returned to the Court at all, but only to the Circuit Judge who received the same in the Grand Jury Rooms.

A court has variously been defined as:

> "Persons officially assembled, under authority of law, at the appropriate time and place, for the administration of justice." *Re Allison,* 13 Colo. 525, 22 Pac. 820 (Emphasizing place):
>
> "A tribunal organized according to law, and sitting at fixed times and places for the administration of justice." *People ex rel Eckerson vs. Haverstraw,* 151 N. Y. 75, 45 N. E. 384;
>
> "A tribunal established for the *public* administration of justice and composed of one or more judges, who sit for that purpose at fixed times and places." *Mason vs. Woerner,* 18 Mo. 566, *Hertzen vs. Hertzen,* 104 Ore. 423, 208 Pac. 580; (Emphasis supplied):
>
> "An organized body, with defined powers, meeting at certain times and places, for the hearing and decision of causes and other matters brought before it, and aided in this, its proper business, by its proper officers * * *." *Moline vs. C. B. & Q. Ry. Co.,* 262 Ill. 52;
>
> "An incorporeal political being which requires for its existence the presence of its judges, or a competent number of them, and the clerk or prothonotary,

at the time during which, and the place where, it is, by law, authorized to be held, and the performance of some *public* act indicative of a design to perform the functions of a court." *Re Terrill,* 52 Kan. 29, 34 Pac. 438; (Emphasis supplied).

"A place wherein justice is judicially determined, meeting at fixed times and places, and deciding issues brought before it, with a clerk to record and attest the proceedings, as well as an executive officer to execute its orders." *Fitzpatrick vs. Simmonson Bros. Mfg. Co.,* 86 Minn. 140, 90 N. W. 378.

Both time and place are essential constituents of the organization of a court: *Re Steele,* 156 Fed. 853; *Ross vs. Austill,* 2 Cal. 183; *Stevens vs. Young,* 180 Ky. 154, 202 S. W. 481, and many other cases, too numerous to cite in this brief.

While the language used in these definitions is widely diverse, there is remarkably little actual difference in them, and throughout all of them there is present the concept that a court is "incorporeal", and needs for its existence a definite time, place and personnel.

It is elementary that a court acts only when sitting, or, to phrase differently the same idea, when in session; that, except in clearly defined cases where a judge may act in chambers, in which exception the reception of indictments is not included, the person of the Judge alone does not constitute the person of the Court, any more than does the person of the clerk, the stenographer, or the bailiff. A court exists only when properly convened according to law, and only when all the essential elements of time, place and personnel have been fulfilled.

The distinction between "incorporeal" institution of the court with the corporeal person of the Judge thereof is well put in *Venhoff vs. Morgan,* 11 Ky. L. Rep. 276, where it is said:

"Certainly, both as to *time* and *place,* it is essential to the conception of a court of justice; *it would be eminently Caligulan could it act when and where it pleases the judge.* Without recourse to the notion of a court as a sort of incorporate entity, it is obvious

> that a *judge* does not at *all times and places constitute a court,* and that he cannot, when he pleases, assert and enforce his judicial power. He becomes a judge when he is appointed or elected, but he becomes a court only when, at the *time and place designated by law, he performs judicial duties* * * *. Jurisdiction is not predicated of the judge, but of the court * * * the existence of (a) limited class of ancillary acts, which he may do elsewhere and at another time, has the force of a denial that he can so act except with reference to the particular matters embraced in that class. It is the recognized difference between a court and a judge; between acts done in court and at chambers. If what he does is not included in the limited class referred, the act is not void because he has exceeded its jurisdiction, but because it was not an act of the court at all." (Emphasis added). See also, *Stevens vs. Young,* 180 Ky. 154, 202 S. W. 481, and *Vial vs. Elfer,* 120 La. 673, 45 So. 545. (Emphasis supplied).

Moreover, the statute (27.464) is not at all in conflict with M. S. A. 28.965, but that statute must be read in the light of this; read together, the statutes simply mean that an indictment of a grand jury must be presented to the Court, sitting *qua* Court, in a public session; in other words, the indictment must be returned into open court, which means nothing more or less than a sitting of the court which is open to the public.

The Michigan Supreme Court in no way controverted this interpretation of the pertinent laws relating to the presentment of an indictment into open court, and the court merely stated at bottom of page 97 of Vol. 337 Michigan Reports:

> "Complaints relating to the indictments being returned to the Circuit Judge in the grand jury room rather than in the court room and that the Court's charge to the grand jury was prejudicial are without merit, particularly because nothing in the record discloses that anything in this connection served to impair defendant's rights."

But the absence of prejudice is immaterial. As was said by Judge Bazelon, *Quinn vs. United States,* supra,

> "The Supreme Court has long included the grand jury within the scope of the Fourteenth Amendment's equal protection clause, even in the absence of prejudice to an individual defendant."

Neither the Circuit Judge nor the Michigan Supreme Court controverted the fact that the purported instant indictment was received in the grand jury room with the public excluded therefrom with officers standing guard at the doors. Your Petitioner was denied due process of law when he was deprived of his liberty in pursuance to said purported indictment which was neither presented nor received in open court in accordance with the laws of the State of Michigan and the common law.

It follows then that the presentation of this indictment to the Judge in the grand jury room, from which the public was strictly excluded, was not a presentation at a public session of the court, but a presentation at a private and exclusive sitting of a grand jury. It follows further that such presentation occurred either in a purported secret session of the court, invalid because of the statute above quoted and invalid also because of the historical and universal rule of the common law that an indictment must be presented by the grand jury in open court, a rule which has never been altered or abrogated by statute, or, that there was merely an unwarranted invasion of the privacy of the grand jury by the Judge, who then became an unauthorized person before the grand jury. In either case, the indictment "returned" must be held to have been void.

CONCLUSION

The authorities above cited demonstrate that Petitioner has been denied due process of law as required by the Fourteenth Amendment to the Constitution of the United States for the following reasons:

1. The Michigan Courts refused to allow Petitioner to introduce testimony in support of motion to quash in-

dictment wherein Petitioner sought to prove misconduct on the part of the Prosecuting Attorney before the grand jury involving improper influence, direction and control of the grand jury.

2. The Michigan Courts disregarded and refused to consider competent proof of misconduct before the grand jury involving improper influence, direction and control of the grand jury by the Prosecuting Attorney.

3. The Michigan Courts refused to allow Petitioner to introduce testimony in support of motion to quash indictment wherein it was sought to prove that the grand jury prosecutor had been retained by a private interest and further that the grand jury by reason of an attorney-client relationship with this Petitioner and with all other persons indicted by the grand jury.

4. The Circuit Court administered to the witnesses, prosecutors, and court attaches an improper and illegal oath of secrecy, which intimidated the witnesses and prevented Petitioner from showing the improper conduct of the Prosecuting Attorney before the grand jury.

5. The Circuit Judge received the purported indictments returned by the grand jury at improper times and places.

RELIEF SOUGHT

The Writ of Certiorari should issue.

Respectfully submitted,

Roger H. Nielson
of Battle Creek, Michigan

Alfonso A. Magnotta
of Albion, Michigan,
Attorneys for Petitioner.

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HAROLD B. WILLEY,

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1954

No. 515

JOHN D. PICHITINO, Petitioner

v.

THE STATE OF MICHIGAN

Brief Opposing Petition for Writ of Certiorari to Supreme Court of State of Michigan

Frank G. Millard
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General
For Respondent

The Capitol
Lansing 2, Michigan

FRANKLIN DEKLEINE COMPANY, LANSING, MICHIGAN
1954

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1954

No. 515

JOHN D. PICHITINO, Petitioner

v.

THE STATE OF MICHIGAN

Brief Opposing Petition for Writ of Certiorari to Supreme Court of State of Michigan

I

Opinion of the Court Below:

The opinion of the court below is officially reported as *People v. Pichitino*, 337 Mich. [Adv. Sheets July 17, 1953] 90, and appears unofficially in 59 NW 2d 100 under the same title.

II

Counter-Statement on Jurisdiction.[*]

The jurisdiction of this Court is probably invoked under 28 U.S.C. [Revised] § 1257 to review an order of the

[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed record of the court below.

Supreme Court of the State of Michigan entered the 8th day of June 1953 affirming an interlocutory order (93-131) of the circuit court for the county of Calhoun denying petitioner's motion (23) to quash a 23-man grand jury indictment (21) charging a criminal offense, as well as a subsequent order of the State's highest court, entered October 5, 1953, denying petitioner's motion for rehearing.

We oppose jurisdiction solely on the ground that the order of the court below affirming an interlocutory order of the trial court, does not constitute a final judgment or decree within the meaning of § 1257 of Title 28 of the United States Code.

III

Counter-Statement of the Case.

The following facts are deemed essential to decision of the narrow jurisdictional question presently involved.

On the 10th day of April 1951 a grand jury indictment (21-23) charging petitioner with a criminal offense was presented and filed in the circuit court for the county of Calhoun and the accused upon arraignment stood mute (v).

Defense counsel, on the 1st day of Stepember 1951 filed a motion to quash the indictment (23-30) predicated on 24 grounds and supported by affidavits (31-36).

Following the filing of briefs, oral presentation and numerous adjournments, the trial judge, on May 8, 1952 handed down an opinion rejecting petitioner's several objections to the indictment and entered an order denying the motion to quash (93-131).

The Supreme Court of the State, on the 27th day of June 1952, granted petitioner's application for leave to appeal from the interlocutory order denying the accused's motion to dismiss (1-2). Affirmance of such order followed on the 8th day of June 1953, and rehearing was denied on the 5th day of October 1953.

The petitioner, of course, has not as yet been tried on the indictment still pending against him in circuit court, nor has he been convicted of the crime charged therein and sentenced therefor.

IV

The Argument.

1

We respectfully submit the pending petition for writ of certiorari should be denied for want of a final judgment.

Title 28, U.S.C. [Revised], § 1257, confers upon this Court jurisdiction to review by writ of certiorari only final judgments or decrees rendered by the highest court of a State. An order affirming an interlocutory order denying a motion to quash an indictment is, we respectfully submit, not a final judgment.

> *Brown v. South Carolina*, 298 U.S. 639;
> *Polakow's Realty Experts, Inc. v. Alabama*, 319 U.S. 750.

In the case of *Brown, supra*, the Court for want of final judgment, dismissed an appeal from a judgment of the Supreme Court of the State of South Carolina which had overruled exceptions to an order of the trial court denying a motion to quash an indictment, *State v. Brown*, 178 S.C. 294, 182 S.E. 838, while in the case of *Polakow* the Court

for want of final judgment, denied certiorari to review an order of the highest court of Alabama reversing judgments sustaining demurrers to the indictments involved, *State v. Polakow's Realty Experts*, 243 Ala. 441, 10 So. 2d 751.

It is to be noted that in each Federal decision cited by counsel for petitioner, [1] the cause had gone to trial on the merits, conviction had followed, and a sentence imposed. Likewise in recent judicial pronouncements by this Court upon claims of systematic discrimination against Negroes in the selection of grand juries, certiorari had issued to review a final judgment sustaining a conviction for some criminal offense. [2]

V

Conclusion.

In view of the authorities cited, we respectfully submit that the pending petition for certiorari should be denied for want of a final judgment.

Respectfully Submitted,
Frank G. Millard
Attorney General of the State of Michigan
Edmund E. Shepherd
Solicitor General of the State of Michigan
Daniel J. O'Hara
Assistant Attorney General
For Respondent

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[1]
Carter v. Texas, 177 U.S. 442; Martin v. State, 200 U.S. 316; Edwards v. United States, 312 U.S. 473; Quinn v. United States, 203 F. 2d 20.

[2]
Hill v. Texas, 316 U.S. 400; Akins v. Texas, 325 U.S. 398; Cassell v. Texas, 339 U.S. 282.

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HAROLD B. WILLEY, C

IN THE

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OCTOBER TERM, 1953

No. 515

JOHN D. PICHITINO,
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vs.

THE STATE OF MICHIGAN,
Respondent.

REPLY BRIEF

ALFONSO A. MAGNOTTA of Albion, Michigan.

ROGER H. NIELSEN of Battle Creek, Michigan.

Attorneys for Petitioner.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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Respondent.

REPLY BRIEF

I. THE ARGUMENT

The judgment was a final judgment. In Michigan, the determination of a motion to quash is a final judgment insofar as the proceedings before the grand jury are concerned. If denied once, the petitioner is not permitted to submit the question at a later hearing or to a jury because this involves a second hearing upon the same matter. *People vs. Kramer,* 260 Mich. 94; *People vs. Lenic,* 255 Mich. 29; *People vs. Nutter,* 255 Mich. 207. It was pointed out in *People vs. Lenic*:

> "The court's attention was called to the fact that he had already heard and denied the first motion to suppress, and he, accordingly and summarily, denied the second. Defendants raised the question of whether the affidavit was false in fact on motion to suppress, which was heard and denied. They, or either of them, were not entitled to a second hearing on the same matter. The point, then, is on the denial of the first

motion. There being no record on this feature of the case, we cannot find error."

In *People vs. Nutter,* 255 Mich. 207, it was pointed out:

"The denial of the motion to suppress adjudged the arrest to have been legal and the search proper *and ended such issues.*" (Citing authorities).

In *People vs. Kramer,* 260 Mich. 94 at page 95, it was pointed out:

"Respondent claims that the beer, mash and bottles were planted in his home by the officers and that it was for the jury to determine whether this claim is true or not. Respondent made a verbal motion to suppress the evidence. He did not comply with 3 Compiled Laws 1929 section 17288. The court denied the motion. This disposed of the question. At trial he sought to prove that the affidavit upon which the search warrant was issued was false. This was equivalent to *presenting his motion again and having the jury pass upon it.* * * * He is not entitled to a second hearing on the same matter, *or to have the jury determine the admissibility of evidence.* * * * The court properly denied Respondent's second motion and the judgment is affirmed."

While in a sense the order of the State Supreme Court might be considered as the determination of an interlocutory matter, it finally determines in Michigan all questions relating to the action of the grand jury. Matters raised in the motion to quash have been passed on by the trial court and by the supreme court. It could not be presented at a later date to the trial court again after conviction or upon an appeal to the Michigan Supreme Court from the conviction. Consequently, it would not be open to review on petition for certiorari to the Supreme Court of the United States. It is clear then that this is a final judgment because it would be impossible to have a timely petition for certiorari *if* the petitioner were to be tried and convicted at a later date.

The questions raised by the respondent, State of Michigan, were not raised in the court below and cannot be

raised in this court. *Hiawassee River Power Co. vs. Carolina Tennessee Power Co.*, 252 U.S. 341, 64 L. Ed. 601; *Bonner vs. Gorman*, 213 U.S. 86, 53 L. Ed. 709.

The judgment should be reviewed on certiorari. *Phillips vs. Negley*, 117 U.S. 665, 29 L. Ed. 1013. The questions raised upon this petition for certiorari have been presented tc the Michigan Supreme Court and finally passed upon by it. Upon a second appeal to the Michigan Supreme Court, the same questions would be concluded. If petitioner had reviewed the action of the lower court by mandamus rather than by appeal, there is no doubt but what it would have been a final judgment which would be reviewable. See dissent, *Montgomery vs. Ledbetter*, 344 U.S. 178, 97 L. Ed. 204. The question is the power of the state to try the petitioner on a void indictment.

CONCLUSION

In view of the authorities cited, we respectfully submit that the pending petition for certiorari should be granted, particularly in view of the fact that the attorneys for the respondent do not dispute the clear denial of due process illustrated in the previous brief.

Respectfully submitted,

Alfonso A. Magnotta of Albion,
Michigan.

Roger H. Nielsen of Battle Creek,
Michigan.
Attorneys for Petitioner.